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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: LEEWARD HOTELS, L.P., an Arizona Limited Partnership, Debtor.	In Proceedings Under Chapter 11 Case No. B-99-09162 ECF-GBN **SECURED LENDER'S REPLY TO DEBTOR'S RESPONSE TO MOTION TO MODIFY EXCLUSIVITY** **Date of Hearing: January 10, 2000** **Time of Hearing: 10:30 a.m.**

LASALLE NATIONAL BANK, in its capacity as Trustee for the registered holders of DLJ Mortgage Acceptance Corporation, Commercial Mortgage Passthrough Certificates, Series 1997-CF1, by and through its Servicer, Lennar Partners, Inc. (the "Secured Lender") hereby responds to the "Debtor's Response To Motion To Modify Exclusivity" filed on January 3, 2000 (the "Response") filed by LEEWARD HOTELS, LP (the "Debtor").

In essence, the Response asserts that there is no "cause" to modify exclusivity in this case because:

1. This is a "full payout plan," and as such the Supreme Court's admonishment in *In re 203 N. LaSalle St. Partnership*, ___ U.S. ___, 119 S. Ct. 1411 (1999) ("*203 N. LaSalle*") is not applicable;

2. Under any set of circumstances, even though it is a certainty that the Secured Lender will vote its unsecured claim to reject the Plan proposed by the Debtor, the Court cannot assume this Plan

will be in a cramdown posture because that vote will be disallowed under Bankruptcy Code § 502(d) as a result of the filing of a preference complaint against the Secured Lender (which was apparently filed on January 4, 2000);

3. Even if the Secured Lender's claim were not disallowed under Bankruptcy Code § 502(d), the Secured Lender could not possibly in good faith vote to reject the Debtor's Plan, and any such rejection would be disregarded pursuant to Bankruptcy Code § 1126(e); and

4. This Debtor is doing an admirable job in moving this case along and should be rewarded by allowing only its Plan to go to confirmation.

This Debtor's dogged insistence on being the only party that proposes a plan is interesting given the enormous conflict of interest this Debtor (and its principal, Mr. William Kilburg, and the Debtor's counsel, Hebert, Schenk & Johnsen) have with respect to this case. Be that as it may, the Debtor's Response misses the mark on all points. This Plan is ill-conceived and is being prosecuted for the benefit of insiders (Mr. Kilburg and his management company).

1. The Mythical "Full Payout" Plan.

The Debtor asserts that this Plan will have absolutely no legal issues associated with the Supreme Court's decision in *203 N. LaSalle* because it is, after all, a "full payout" Plan. It is interesting to note the hedging terms the Debtor uses with respect to its description of the Plan. For example, the Debtor wisely states: "It [the Plan] is *intended* to provide payment in full to all creditors." *See* Response at 4 (emphasis supplied). *See also* Plan at 10:4-5 ("It is *anticipated* that this will be a 'full pay' plan."). In fact, this Debtor must believe that the Court and creditors cannot read, cannot add, or perhaps both.

(a) The "Release Price" Sales Mechanism.

This Debtor has filed a plan which, if confirmed according to its terms, provides the Debtor a mechanism to sell all of the hotels (the cash flow of which will be the sole source of payment to creditors) at any time after confirmation for a set of "Release Prices" which not only are below what the Debtor asserts are the market values of these hotels, but which sales will not even produce enough cash to take care of the allowed secured claims against this estate. *See* "Objection To Approval Of Debtor's Disclosure Statement Dated October 29, 1999" filed by the Secured Lender on January 3, 2000 (the

"Disclosure Statement Objection") at Exhibit "3" (showing that the "Release Prices" for the seven hotels total approximately $12 million, while the Debtor's Disclosure Statement states that fair market value of those same hotels is $14.2 million). A copy of that exhibit, as well as the Exhibit "H" to the Disclosure Statement, are attached hereto as Exhibit "1" for ease of reference.

Further, the Secured Lender will be required to release its lien interest in any individual hotel upon payment of the "Release Price." *See* Plan, Art. VI at 11.[1]

(b) Impact Of Sales At "Release Prices."

Notwithstanding the Debtor's beguiling protestations of being the "saving grace" for the downtrodden unsecured creditors in this estate, ***what the Debtor never seems to talk about in its Disclosure Statement (or in its Response) is what would happen if the Debtor were to do exactly what it seeks Bankruptcy Court permission to do in the Plan process—sell the hotels for the "Release Prices."***

Taking the Debtor's numbers at face value, if this Plan were to go effective (as per the Debtor's assumption) on June 1, 2000 (*see* Disclosure Statement at 13), by the Debtor's own projections, this Debtor will have approximately $673,000.00 in administrative and priority claims (Classes 1-A and 1-B), approximately $235,000.00 in unpaid real property taxes (Classes 2-A through 2-M); the Secured Lender's allowed secured claim which the Debtor estimates at $13.7 million (Class 2-N);[2] unpaid secured mechanic's lien claim of approximately $53,000.00 (Class 2-Q); unsecured trade claims of approximately $565,000.00 (Class 3-A); the Secured Lender's unsecured claim which the Debtor estimates at $1.7 million (Class 3-B);[3] and other unsecured trade claims of approximately $525,000.00 (Classes 3-D and 3-E). This does not take into account the secured claims of GMAC or Amresco, or the alleged claims of the Samoth Pool. Accordingly, when one looks at just the claims set forth above, the Debtor estimates it will have **$17,451,000.00** in claims in June of 2000 when it estimates the Plan will

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[1] The Plan's almost offhand treatment of this is deceptive. Nowhere in the treatment portion of the Secured Lender's claim (at Art. V at 8:10-19) is any mention whatsoever made of the mandatory "Release Price" provisions found in Art. VI.

[2] As set forth more specifically in the Disclosure Statement and Proofs of Claim which have been filed in this case, the Secured Lender believes that the Debtor has materially understated the allowed secured claim. Be that as it may, for purposes of this Reply, that is not material as will be shown above.

[3] Again, as set forth in the Disclosure Statement Objection, the Secured Lender believes that the Debtor has materially understated the unsecured claim of the Secured Lender. Again, for purposes of this Reply that is not material as will be shown above.

go effective. *See* Exhibit "F" to the Disclosure Statement, a copy of which is attached hereto as Exhibit "2" for ease of reference.

If the Debtor arranges for sales of the seven hotels for the "Release Prices" on June 15, 2000, it will produce gross proceeds of **$11,967,333.44**. *See* Exhibit "1" hereto. After paying off the secured tax claims of approximately $235,000.00 (and even assuming, to give the Debtor the benefit of every doubt, that there will be no sales commission due with respect to any of these sales), that will leave approximately $11,732,333.44 in total proceeds. ***Simply running the mathematical calculations under the Debtor's Plan, it is apparent that if this Plan were confirmed as requested by the Debtor, and the Debtor in fact took advantage of the "Release Price" provisions that are apparently a material part of its Plan, this will not only not be a "full payout" Plan, but is indeed a "no payout" Plan to unsecured creditors, and indeed is not even a "full payout" of allowed secured claims with respect to the hotels being sold:***

		Payout
"Release Prices"	$11,967,333.44	
Secured Taxes	(235,000.00)	100%
	11,732,333.44	
Secured Lender's Secured Claim (as per Debtor)	(13,700,000.00)	85%[4]
	(1,967,666.56)	
Administrative/Priority (non-realty tax)	(673,000.00)	0%
	(2,640,666.56)	
Trade Claim (Class 3-A)	(565,000.00)	0%
	(3,205,666.56)	
Secured Lender's Unsecured Claim (Class 3-A, as per Debtor)	(1,700,000.00)	0%
	4,905,666.56	
Other Trade Claims	(525,000.00)	

[4] Not including any prepayment yield maintenance amounts that may be payable.

"Preference Recovery Pool"	500,000.00	95%[5]
	(25,000.00)	
	$ (4,930,666.56)	

Accordingly, while the Secured Lender is sure that the Debtor "intends" or "anticipates" it will pay all claims in full, the only way that can happen is if the Debtor disregards portions of its Plan. If the Debtor has no intention of selling the hotels for the "Release Prices," why are those provisions in the Plan at all?

(c) "Baby Needs A New Pair Of Shoes."

Moreover, and again looking at the Debtor's own projections (*see* Disclosure Statement, Exhibit "F" attached hereto as Exhibit "2"), the only way the "full payout" in this case comes for the Secured Lender's secured claim (Class 2-N) and unsecured claim (Class 3-B) is at the end of seven years, ***and then*** only if the Debtor is able to sell or refinance the hotels for an amount sufficient not only to pay off the rather large balloon payment that will come due (which by the Secured Lender's estimate is in excess of $13 million), but also enough to pay any unpaid unsecured claims of the Secured Lender in Class 3-B (which by the Debtor's own estimates are in excess of $100,000.00), ***and then*** only if the Debtor forgoes its "Release Price" sales rights.

The debtor would have this Court believe that this is simply a feasibility issue, and it should be allowed to go to a contested confirmation to convince the Court that by December 31, 2007, the value of these properties will be of a sufficient value to sell or refinance to take out all unpaid claims, in full, and further assuming that the Debtor does not take advantage of the rather interesting "Release Prices" sale authority it seeks in the Plan. Does this Debtor truly believe that any rational person would consider this a "full payout" Plan of Reorganization?[6] One wonders what discount factor would be applied to this cash stream given the risk factors inherent in the speculative nature of the payout in 7 years.

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[5] Again, this gives the Debtor the benefit of the doubt that it will be able to collect the entire alleged preference against the Secured lender, and incurs no attorneys' fees or costs in that process. The Secured Lender does not believe it received any avoidable preferences at all. *See* Disclosure Statement Objection at 15-17. This also creates the bizarre circumstance wherein so-called "essential trade vendors" for the retained hotels (Class 3-A) will receive no recovery since under the Plan, these creditors do not share in the "Preference Recovery Pool."

[6] The Debtor further touts the fact that its Plan is paying interest on unsecured claims, thereby further buttressing its "full payout" assertion. The Debtor cites *In re Dow Corning Corp.*, 237 B.R. 380 (Bankr. E.D. Mich., 7/30/99) (Spector, B.J.), to show that the federal judgment interest rate is an approximate interest rate to give "present value" of all claims. The *Dow Corning* decision says no such thing. Judge Spector held that for the best interests of creditors test under Bankruptcy Code § 1129(a)(7), the federal judgment rate was appropriate.

The Debtor's Plan brings to mind the immortal words of San Francisco's Detective Harry Callahan: "Do you feel lucky today, punk? Well, do you?" *Dirty Harry* (1977). While the Debtor is content to "roll the dice" on the future payout, it has no equity at risk, and if the Plan fails it has lost nothing at all. The Secured lender, in the exercise of reasonable business judgment, declines to speculate with this Debtor.

2. The Mythical "New Cash" Infusion.

Much like the mythical "full payout" Plan, this Debtor further tells the Court that it should be allowed to proceed to confirmation because this is, after all, an example of a "new value" infusion Plan where the principals of this Debtor will (finally) be having some "at risk" equity in this entity. In fact, the only "risk" in this case is to the creditors because the so-called "new cash" is nothing more than a loan which is secured by a junior lien on all the property of the Debtor, which loan is "guaranteed" by the general partner, Kilburg Hotels, LLC.

As a matter of law in the Ninth Circuit, a guaranty is simply not "new value." *See In re Ambanc La Mesa Limited Partnership*, 115 F.3d 650, 654-655 (9th Cir. 1996) (the Court may only count a partner's up-front, actually paid money on the effective date for purposes of the new value corollary to the absolute priority rule); *In re Kham & Nate's Shoes No. 2, Inc.*, 908 F.2d 1351, 1361 (7th Cir. 1990) ("Guarantees [by old equity] are no different [than promises of future labor]. They are intangible, inalienable, and unenforceable…. The [old equity holders] may revoke their guarantees or render them valueless by disposing of their assets…. Guarantees have 'no place in the asset column' of a balance sheet.").

Under this Debtor's Plan, the Seventh Circuit's admonition in *Kham & Nate's Shoes* is even more significant. Here, the "guarantee" is secured by a junior lien on all the assets of the reorganized Debtor. That will clearly come ahead of any distribution to unpaid unsecured creditors in this case.

In fact, Judge Spector issued an amended opinion on December 1, 1999, entitled, aptly enough, "Amended Opinion On Cramdown Of Class 4 [General Unsecured Claims]: Is It Fair And Equitable To Cram Down Commercial Claims With Interest Less Than Contract Rate?," a true and correct copy of which is attached hereto as Exhibit "3" (the "Amended Opinion"). In the Amended Opinion, the Court specifically distinguished its July 30 decision, saying it only applied to the best interests of creditors test under § 1129(a)(7). *See* Amended Opinion at 26. For purposes of cramdown of unsecured creditors under § 1129(b)(1) (*i.e.* payment in full), Judge Spector held that contract rate of interest (not the federal judgment rate) is required, and should begin to accrue during the pendency of the Chapter 11 case. In essence, he answered the question posed in the title of his Amended Order: "No."

Moreover, as Mr. Kilburg candidly acknowledged in his Bankruptcy Rule 2004 Examination, the "guarantor" in this case (Kilburg Hotels, LLC) is an entity that was created in late January, 1999, and has no assets. *See* Bankruptcy Rule 2004 Transcript of William Kilburg conducted at 22:25 through 23:20.[7]

Accordingly, the Debtor's assertion in its Response that, "The [new franchise] agreement requires the guaranty of Kilburg LLC and a second lien on the hotels, thereby supplying the 'risk' Lennar deems is necessary for this Plan to be real" is indeed curious. The "risk" that the Secured Lender believed is necessary is at-risk capital from Mr. Kilburg or his entities. The only "risk" in this Debtor's Plan is that if this loan comes due, the cash flows from the hotels (to the extent, again, not sold for the "Release Prices") will first be used to pay the junior lien before going to any unsecured creditor (including the Secured Lender's unsecured claim). That is not the sort of "risk" that the caselaw talks about when they talk about "at-risk equity infusions."[8]

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[7] Specifically, Mr. Kilburg testified as follows:

> **QUESTION (by Mr. Smith):** Do you remember the exact date you formed Kilburg Hotels?
>
> **ANSWER (by Mr. Kilburg):** *Oh, I think it was January 29th [1999].* It'll be on the paperwork.
>
> **Q:** Who participated in the decision to form Kilburg Hotels?
>
> **A:** Myself and my wife. My seven year old, to a certain extent.
>
> **Q:** Does he or she have extensive training in hotel management?
>
> **A:** The wife, yes; the seven year old, no.
>
> **Q:** What assets, if any, did Kilburg Hotels have when it was formed?
>
> **MS. JOHNSEN:** I'll object to that as irrelevant.
>
> **QUESTION (by Mr. Smith):** You can answer.
>
> **ANSWER (by Mr. Kilburg):** *None*.
>
> **Q:** What was the purpose for forming Kilburg Hotels?
>
> **A:** To hold the interests in the 12 hotels in question.

Bankruptcy Rule 2004 Tr. at 22:25 through 23:20 (emphasis supplied).

[8] Equally important is that during the time period of this Plan, and before any payments are made to unsecured creditors, the management fee and accounting fee payable to Kilburg Management, an entity owned by Mr. Kilburg, will be

In short, this Debtor believes that it has found the ultimate form over substance way to evade the Supreme Court's mandate in *203 N. LaSalle*. Specifically, the Debtor proposed a Plan which "intends" to be a full payout, even though that full payout would require massive balloon payments seven years in the future (again, provided that the Debtor refrains from selling the hotels for the "Release Prices"), and during this time is able to reap millions of dollars in management and accounting fees for insiders while the creditors bear all the risk. Indeed, while the Debtor assails the "zest" of the Secured Lender in raising the *203 N. LaSalle* issue, the Debtor's transparent attempt to evade the Supreme Court's ruling is sophomoric. It also raises the question—for whose benefit, exactly, is this plan being prosecuted?

3. The Debtor's Attempt To Negate The Secured Lender's Negative Vote Will Not Succeed.

The Debtor takes the position that the Court shouldn't assume this Plan will be in a "cramdown" posture because the guaranteed negative vote of the Secured Lender in this case (both as a Class 2-N secured creditor and a Class 3-B unsecured creditor) will not count for balloting purposes. The basis for this, the Debtor reasons, is that the Debtor filed a preference complaint against the Secured Lender (on January 4), and further that the Secured Lender couldn't possibly vote, in good faith, to reject a "full payout" Plan. As such, any rejection vote of a full payout plan would be in bad faith and therefore disregarded pursuant to Bankruptcy Code § 1126(e).

(a) The Pending Preference Action Does Not Invoke §502(d).

While a creative attempt to disenfranchise the single largest creditor in the case, unfortunately for the Debtor it runs afoul (yet again) of Ninth Circuit law. Specifically, the Debtor's assertion that the mere filing of the preference action against the Secured Lender will invoke Bankruptcy Code § 502(d)

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paid from the cash flows of the hotels. Accordingly, even to the extent that the Debtor does not sell the hotels during the seven year life of the Plan for the "Release Prices" Kilburg Management will be paid **$2,394,783.00** in management fees over that time period (again all of which will be paid prior to any distribution to unsecured creditors), as well as a $1,500.00 per month per hotel accounting fee charge (again, charged by Kilburg Management), amounting to **$882,000.00** (again, which will be paid ahead of unsecured creditors). *See* Disclosure Statement, Exhibit "E", page 1. Accordingly, Kilburg Management will realize a benefit of approximately **$3.3 million** with respect to its management contract on these hotels even if the Debtor keeps them a full seven years in hopes of being able to make the balloon payments necessary to the Secured Lender on both its secured and unsecured claims of over $13.1 million.

and make the Secured Lender's claim disallowed (and therefore unable to vote pursuant to Bankruptcy Code § 1126(a), which provides that only the holder of an "allowed" claim under Section 502 may vote) is wrong as a matter of controlling law.

In the Ninth Circuit, the mere filing of a preference or other avoidance action does not invoke the disallowance provisions of Bankruptcy Code § 502(d). In fact, before Section 502(d) is invoked, the Debtor must succeed in establishing a preference—the mere assertion of it is simply insufficient. *See In re Parker North American Corporation*, 24 F.3d 1145, 1155 (9th Cir. 1994) *("If successful in establishing preference liability,* [the Debtor] will invoke Section 502(d) of the Code, which requires the Bankruptcy Court to disallow claims asserted by a creditor who has received a preferential transfer unless the creditor disgorges the preference payments. 11 U.S.C. §502(d)"). *See also In re Atlantic Computer Systems*, 173 B.R. 858 (S.D.N.Y. 1994), in which District Judge Haight opined:

> The Fifth Circuit's interpretation of Section 502(d) [in *In re Davis*, 889 F.2d 658 (5th Cir. 1989)] is supported by *Collier On Bankruptcy*. That treatise describes the operation of Section 502(d) as follows:
>
> > *Once the liability of the transferee has been determined,* the claim interposed by the transferee will be disallowed unless such transferee gives effect to the judgment flowing from the exercise of the avoiding powers described above. 3 *Collier On Bankruptcy*, ¶502.04 (15th edition 1993) (emphasis added).
>
> *That description clearly envisioned some sort of determination of the claimant's liability before its claims are disallowed,* and in the event of an adverse determination, the provision of some opportunity to turn over the property.

Id. at 861-862 (emphasis supplied). As such, the strategic filing of a preference complaint a few days before the hearing on the Secured Lender's exclusivity motion will not produce the result the Debtor hoped for.

(b) The Rejection Votes Will Not Be In Bad Faith.

The Debtor's reliance on the bad faith disallowance of the rejection vote of the Secured Lender under Bankruptcy Code § 1126(e) is likewise misplaced. As the Ninth Circuit recognized in *In re Figter, Ltd.*, 118 F.3d 635 (9th Cir. 1997), a secured lender which is acting to protect its interests in a case (even to the extent it frustrates the desires of a debtor or hurts other creditors), is not guilty of bad faith. In *Figter*, the secured creditor purchased 21 unsecured claims against the Chapter 11 debtor, thereby rendering the Debtor's proposed plan unconfirmable. The debtor sought to disqualify the votes under Bankruptcy Code § 1126(e). The Ninth Circuit held that not only was the secured creditor's purchasing of the claims for the purposes of blocking confirmation not in bad faith, but moreover, the secured creditor could vote each of the 21 claims separately. The Ninth Circuit reasoned:

> If a person seeks to secure some untoward advantage over other creditors for some other ulterior motive, that will indicate bad faith. *See In re Marin Town Center*, 142 B.R. 374, 378-79 (N.D. Cal. 1992). ***But that does not mean that creditors are expected to approach reorganization plan votes with a high degree of altruism and with a desire to help the debtor and their fellow creditors. Far from it.***
>
> > If a selfish motive were sufficient to condemn reorganization policies of interested parties, very few, if any, would pass muster. On the other hand, pure malice, "strikes" and blackmail, and the purpose to destroy an enterprise in order to advance the interests of a competing business, all plainly constitute bad faith, are motives which may be accurately described as ulterior.
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> *In re Pine Hill Collieries Company*, 36 F. Supp. 669, 671 (E.D. Penn. 1942). That is to say, ***we do not condemn mere enlightened self-interest, even if it appears selfish to those who do not benefit from it.*** *See id.*

In re Figter, 118 F.3d at 638 (emphasis supplied).

In this case, this Debtor (and its principal, Mr. Kilburg) have acquired hotels that were already encumbered and in default for no out of pocket, at-risk equity. *See* Disclosure Statement Objection at 30. The Debtor proposed a Plan in which the equityholders of Debtor will once again not put any at-risk

capital into this case, and will obtain approximately $3.3 million in management fees and accounting fees for the benefit of a management company owned by the principal of the Debtor (Mr. Kilburg).[9] The only payments creditors will receive will be the cash flow from the hotels which are encumbered by the Secured Lender, and the Secured Lender will have to hope that on December 31, 2007, the hotels can be sold or refinanced for an amount sufficient to pay its approximately $13.1 million balloon payment, and further hope that the Debtor does not exercise its sale rights for the "Release Prices" that it seeks in the Plan.

The Secured Lender's negative reaction to this Plan is not out of spite or malice, but rather is based on clear self-interest and normal business rationale. The fact that it frustrates the Debtor's desire to perpetuate its "no at risk capital strategy" and ability to keep a management contract that benefits Mr. Kilburg's other company is of no consequence. This is not a full payout Plan except under the most extreme leaps of faith which the Secured Lender is not prepared to take, and indeed no rational person would take. It is, instead, the Debtor's attempt to obtain economic benefits and put all of the risk and consequence of failure in this case on the Secured Lender by continuing to milk the hotels that serve as collateral for its loans.

As such, this Plan will most definitely be in a cramdown posture, and as much as the Debtor would like to ignore the rejecting votes of the Secured Lender, they will be counted and the Debtor will have to put on a cramdown case. The Debtor's Plan, by its own terms, is by no means a full payout Plan but in fact may be a zero payout Plan for the Secured Lender's unsecured claim (and indeed not even a

[9] *See* note 8, *supra*. The lengths to which Mr. Kilburg will go to avoid putting in any at-risk capital are extraordinary. For example, in the letter with Best Franchising, Inc. ("Best") outlining the terms of the new loan (Exhibit "G" to the Disclosure Statement), Best wanted Kilburg Hotels to pay "up to $10,000 for out of pocket legal fees incurred by [Best] in effectuating the transactions contemplated in this Agreement." *See* Exhibit "G" at 4. Mr. Kilburg interlineated that the $10,000.00 to be paid by Kilburg Hotels would be "out of the signing payment." In other words, Kilburg Hotels is even financing (using the Debtor's assets as collateral) the transactions fees of Best.

full payout Plan if the "Release Price" provisions are invoked) for the Secured Lender's secured claims. *203 N. LaSalle* is applicable and controlling.[10]

4. The Debtor's "Efforts" Do Not Preclude A Modification Of Exclusivity.

Finally, the Debtor asserts that it should be given time to confirm a Plan because it will be "the saving grace for over 800 unsecured creditors in this case" (*see* Response at 3), and because it is making efforts in this case. In fact, there are not over 800 unsecured creditors in this case, and of the $3.5 million in asserted unsecured debt, there is less than $1 million of unsecured debt. *See* "Objection to Allowance Of Claims Pursuant To Bankruptcy Code § 502(a) And Bankruptcy Rule 3007" filed on December 1, 1999. Clearly over two-thirds of the alleged $3.5 million in unsecured claims against this estate are not properly claims against this estate at all, and but for this Debtor's conflict of interest in attempting to benefit the general partner and limited partners, would never have been listed as claims against this estate.

Moreover, this Debtor once again (as it did in its Disclosure Statement) delves into pre-bankruptcy settlement discussions, and then misstates them. *See* Response at pp. 2-3. As set forth in the Disclosure Statement Objection, Mr. Kilburg transferred these hotels to the debtor entity without informing the Secured Lender in the middle of workout negotiations, and the final sticking point in those workout negotiations was Mr. Kilburg's insistence on a management contract which was more expensive than a management contract that the Secured Lender had already arranged with Prism Hotels

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[10] In a final argument, the Debtor asserts that the Secured Lender might not even have an unsecured claim because of its ability to make its elections under Bankruptcy Code § 1111(b)(2). As the Court may be aware, the Debtor has agreed that it will amend its Plan to treat the Secured Lender's claims as separate claims (as required by the caselaw). *See* "Response To Motion Under Bankruptcy Rule 3013 For Determination Of Propriety Of Classification" filed on January 3, 2000. The Secured Lender has already made its Bankruptcy Code § 1111(b) election with respect to three of those claims. *See* "Secured Lender's Election Pursuant To Bankruptcy Code § 1111(b)(2) (Ottawa Loan)"; the "Secured Lender's Election Pursuant To Bankruptcy Code § 1111(b)(2) (Olathe Loan)"; and the "Secured Lender's Election Pursuant To Bankruptcy Code § 1111(b)(2) (Liberty Loan)", all filed on January 3, 2000. Of the Secured Lender's 20 separate claims in this case (*see* "Proofs Of Claim" filed on January 3, 2000), the Secured Lender has made its Section 1111(b) election with respect to three of those claims, and will still have a substantial unsecured deficiency claim which must be dealt with in this case. As such,

(based in Dallas). The Secured Lender had arranged for Prism to take over the management of all of the Secured Lender's hotels at a 3% management fee, and $1,200.00 per hotel per month for accounting fees. Attached hereto as Exhibit "4" is information on Prism Southwest Management Company and its principals. As part of the pre-bankruptcy negotiations, Mr. Kilburg (presumably speaking on behalf of Kilburg Management), when informed that the Kilburg Management contract was "richer" than the one arranged with Prism, betrayed where his true loyalties and interests lie:

> This management contract is a fairly special circumstance and the terms we discussed should reflect the rights that I am giving up as part of the deal. ***Attempting to confirm this to an independent third party deal that may have been "ground down" by your REO department will not work for me.*** As we discussed, by going down this path I am attempting to be reasonable and avoid a situation that is bad for everybody. ***I am not, however, prepared to completely capitulate and accept a deal not in my interests.***

See e-mail from Mr. Bill Kilburg to Steve Buckley of the Secured Lender dated Friday, July 30, 1999 at 12:57 p.m., a true and correct copy of which is attached hereto as Exhibit "5" (along with a copy of the e-mail to which Mr. Kilburg was responding from Mr. Buckley) (emphasis added).

It is unclear why the Debtor believes that it should be getting into pre-bankruptcy settlement discussions and negotiations, particularly when those settlement discussions and negotiations specifically show that Mr. Kilburg's "interests" are much more aligned towards preserving an above-market management contract for his management company than being the "saving grace" for the creditors.

Finally, the Response states that the Debtor employs 450 people. *See* Response at 2. In fact, this Debtor employs no people. As Mr. Kilburg stated in his Bankruptcy Rule 2004 Examination, this Debtor entity has no employees, and all the employees are employees of Kilburg Employment, yet another entity owned by Mr. Kilburg. *See* Kilburg Tr. at 88:7 through 89:25.

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this Court can be assured that this Plan will be in a cramdown mode and that notwithstanding tactical moves by this Debtor,

In short, this Debtor insists on making misrepresentations to this Court and goes into discussions that were engaged in as part of pre-bankruptcy settlement negotiations. While that in and of itself is unusual, once engaging in that exercise, it cannot misrepresent what actually occurred in those negotiations as they have consistently done in both the Disclosure Statement and the Response.

CONCLUSION AND RELIEF REQUESTED

There is adequate "cause" to allow the Secured Lender to file a competing plan in this case. It is required by the Supreme Court's mandate in *203 N. LaSalle*, and all of the machinations of this Debtor in attempting to create the illusion of a "full payout" plan will not preclude the applicability of the Supreme Court's decision in that case. This Debtor continues on a course to benefit not the creditors, but rather its own interests in preserving a management contract that will provide over $3.3 million in income to it at the expense of the Secured Lender. The best way to determine which result will retire more debt and otherwise deal with legitimate claims is to allow the Secured Lender to file its competing plan.

RESPECTFULLY SUBMITTED this 6th day of January, 2000.

SQUIRE, SANDERS & DEMPSEY L.L.P.
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By /s/ Thomas J. Salerno
Thomas J. Salerno
Jordan A. Kroop
Attorneys for the Secured Lender

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the Secured Lender's rejection votes will need to be counted and *203 N. LaSalle* is fully applicable.

COPY of the foregoing mailed
this 6th day of January, 2000, to:

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